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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-197

JAMES WILKINS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered May 22, 1978.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Ninth Circuit appears in Appendix "A" hereto. No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 22, 1978. Petitioner's timely Petition For Rehearing before the Court of Appeals for the Ninth Circuit was denied in an order filed on July 5, 1978. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. Section 1254(1).

QUESTION PRESENTED FOR REVIEW

WAS THE PETITIONER DENIED DUE PROCESS BY THE COURT'S DENYING HIS MOTION FOR SEVERANCE AND ALLOWING THE GOVERNMENT TO INTRODUCE INTO

EVIDENCE AGAINST HIM CERTAIN NARCOTIC SUBSTANCES?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . . "

Rule 8, Federal Rules of Criminal Procedure:

> "(a) Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) Two or more defendants may be charged in the same indictment or information if they are alleged to have

participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Rule 14, Federal Rules of Criminal Procedure:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

STATEMENT OF THE CASE

On February 27, 1976, the Federal Grand Jury for the Central District of California returned a one count indictment, charging JAMES HARVEY WILKINS and others for violations of Title 21 U.S.C. §§963, 846, 841(a)(1), to wit: Conspiracy to Import Narcotic Controlled Substance; Conspiracy to Possess With Intent to Distribute, and to Distribute Narcotic Controlled Substance.

Prior to trial, Petitioner's Motion For Severance was heard by the Court and denied. A jury trial then commenced.

On May 14, 1976, Petitioner and his co-defendants were found guilty as charged in the indictment.

On May 28, 1976, Petitioner was sentenced to the custody of the Attorney General for a period of eight (8) years with a special parole term of eight (8) years, pursuant to the provisions 21 U.S.C. §841(b)(1)(A).

On May 22, 1978, the United States

Court of Appeals for the Ninth Circuit affirmed Petitioner's conviction. The Opinion of the Court of Appeals appears in Appendix "A", infra.

STATEMENT OF FACTS

At the trial of this case, the Government introduced evidence through documents, narcotic controlled substances and witnesses that the defendants, Derek Estes, Clarence Larkins, Charles Gray, and Barbara Gaston, were importing and distributing large amounts of narcotic substances during the latter part of 1973 to at least August 25, 1975. On August 25, 1975, Charles Gray and Barbara Gaston were arrested at the Miami, Florida Airport with a suitcase containing twelve (12) pounds of heroin that had been imported from Thailand.

The only testimony that indicated that Petitioner (hereafter "WILKINS") was involved with the other defendants in narcotics transactions came from the witnesses, George McGee and Deborah Taylor, both of whom testifed under grants of immunity.

Deborah Taylor testified that the first time she met WILKINS, aka Memphis Slim, was in December, 1973. At that time, the defendants, Gray and Estes, were trying to obtain cocaine for WILKINS, but were unsuccessful. In January, 1974, Miss Taylor traveled to Detroit, Michigan and delivered one pound of cocaine to WILKINS, who she knew as "Memphis Slim". In late January or early February, 1974, the defendant, Charles Gray, again asked Miss Taylor to make another delivery of cocaine to Detroit. Miss Taylor refused to go and the trip was made by Cheryl DeBise, a friend of George McGee. The witness, George McGee, testified that the narcotics Cheryl DeBise took to Detroit were to be delivered to a "Detroit Slim".

In February, 1974, Miss Taylor and the defendant, Charles Gray, traveled to Detroit. Charles Gray told Miss Taylor that the reason they were going to Detroit was that Gray wanted to talk to WILKINS about money WILKINS owed for narcotics. However, no testimony was

introduced as to the subject of the conversation between WILKINS and Gray. After Miss Taylor and Charles Gray returned from Detroit, and still in February, 1974, a "Cheryl" that Miss Taylor had met in Detroit in January, 1974, with WILKINS, came to Los Angeles to pick up some narcotics.

On December 12 or 19, 1973, the co-defendant, Derek Estes, using the alias, Eugene Taylor, rented an automobile at the Detroit Metropolitan Airport. On December 23, 1973, a man who stated his name was JAMES WILKINS paid $100.00 towards Taylor's car rental. The person who received the $100.00 payment from JAMES WILKINS did not identify WILKINS as the person who gave her the money.

Beginning in February, 1974, George McGee associated himself with Estes, Larkins and Gray, and began distributing narcotics. Beginning in April or May, 1974, Estes, Larkins and Gray began getting narcotics from Mexico through Idelia Castello.

Various telephone records of the

co-defendants, other than WILKINS, were introduced into evidence. From these toll records, which covered the period January, 1974 through March, 1976, and contained in excess of 600 telephone calls, 12 short telephone calls were shown to numbers connected with WILKINS.

On August 25, 1975, when the co-defendant, Gray, was arrested, he had an address book containing, among others, WILKINS' telephone number.

In addition to allowing the co-defendant Charles Gray's telephone book to be introduced into evidence against WILKINS, the Court also allowed twelve (12) pounds of heroin to be introduced into evidence against WILKINS.

REASON FOR GRANTING OF WRIT

The question presented in this matter deals with the denial of due process to WILKINS by reason of the Court's denial of his Motion For Severance, and by allowing the introduction into evidence against WILKINS and over his valid

objection of twelve (12) pounds of heroin with which he had no connection.

A. The Indictment Alleged and the Evidence Showed More Than One Conspiracy

The Indictment in this case sets forth 26 overt acts by the various defendants. However, the Petitioner is only mentioned in overt act 8 and overt act 11. Overt act 8 alleges as follows:

> "8. On or about late January or early February of 1974, unindicted co-conspirator, Deborah Taylor, flew to Detroit, Michigan, and gave approximately one (1) pound of cocaine to the defendant, JAMES HARVEY WILKINS, aka 'Memphis Slim'."

Overt act 11 alleges as follows:

> "11. On or about late January or early February of 1974, unindicted co-conspirator, Cheryl DeBise, flew from Los Angeles, California to Detroit, Michigan, in order to deliver narcotic drug controlled

> substances to an individual named 'Slim'."

It is Petitioner's position that the Indictment as drawn indicated more than one conspiracy involving Petitioner with all other defendants. By reason of this fact, as well as the fact that the only evidence of controlled substances that was involved in the Indictment was twelve (12) pounds of heroin seized on August 25, 1975, more than eighteen (18) months after the last alleged overt act involving Petitioner, Petitioner moved the trial court for a severance pursuant to the provisions of Rules 8 and 14 of the Federal Rules of Criminal Procedure; which motion was denied.

The evidence introduced at the trial disclosed a minimum of two (2) conspiracies, two of which commenced after the date of the last overt act involving Petitioner.

When convictions have been obtained on the theory that all defendants were members of a single conspiracy, although, in fact, the proof discloses

multiple conspiracies, the error of variance has been committed.

Berger v. United States, 295 U.S. 78, 55 S.Ct. 629 (1935)

Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239 (1946)

In the Indictment and at the trial, the Government's theory was that there was one over-all conspiracy to import and distribute narcotics. It also appears that the Government's theory that WILKINS was a member of a ongoing over-all conspiracy is based on the general rule that when one joins an existing conspiracy, he becomes liable for all that has happened before and what may happen in the future in furtherance of the conspiracy.

In Canella v. United States, 157 F.2d 470 (9th Cir.1946), the court, interpreting the general rule, has recognized that (Page 476):

> "to bring the rule into operation, it is not enough that, when one joins with another in a criminal venture, he knows that his confederate is engaged in other criminal undertakings with other persons, even though they may be of the

> same general nature. The acts and declarations of confederates, past or future are never competent against a party, except insofar as they are steps in furtherance of a purpose common to him and them."

In Daily v. United States, 282 F.2d 818, 820 (9th Cir. 1960), the court states:

> "to prove a single conspiracy, the prosecution must show, among other things, that all the defendants agreed to effectuate a central criminal design."

The evidence in this case did not establish a "central criminal design" involving all of the defendants, including Petitioner, but a series of criminal designs, similar in nature, but separate and distinct in practice.

In United States v. Baxter, 492 F.2d 159 (9th Cir. 1973), the Government indicted 49 individuals divided into three groups for trial, alleging a narcotics conspiracy. There, the court found one over-all conspiracy, but once again recognized the necessity of avoiding the "confusing similar purposes of numerous

separated adventures of like character with the single purpose of an over-all scheme" when it stated (Page 158):

> "While the individual defendant may have entered into a conspiracy with some of the other indicted co-conspirators, the Government had the burden of connecting each defendant directly or circumstantially with a larger over-all scheme.
>
> "Thus, if, at most, the Government proved that the particular defendant purchased narcotics from the Hernandez organization without reason to believe that his ability to do so was because of the existance of an over-all conspiracy involving several retailers, the jury would not be warranted in finding that such defendant participated in an over-all conspiracy."
>
> [See also Kotteakos v. United States, 328 U.S. 750 (1946)]

The only evidence involving the Petitioner directly in the purchase of narcotics from any of the other defendants, was the testimony of Deborah

Taylor, that Petitioner came to Los Angeles in December, 1973, to try to obtain cocaine, and her delivery of cocaine to Petitioner in Detroit, Michigan in January, 1974. No evidence was introduced that Petitioner purchased heroin from the other defendants, or made any purchase of cocaine subsequent to January, 1974; nor that he was involved in any way with importing narcotics into the United States from Mexico and Thailand.

The only evidence involving Petitioner directly in the purchase of narcotics from any of the other defendants was the testimony of Deborah Taylor that WILKINS came to Los Angeles in December of 1973, to try to obtain cocaine, and her delivery of cocaine to Petitioner in Detroit, Michigan in January, 1974. No evidence was introduced that Petitioner purchased any narcotics from the other defendants subsequent to January or possibly February, 1974, nor that he was involved in any way with importing narcotics into the United States from

Mexico and Thailand.

Petitioner is well aware of the settled rules holding that a granting of a severance is within the sound discretion of the trial court, and that a showing of prejudice for a severance requires more than the mere assertion that a defendant will have a better chance of acquittal if tried separately. However, Petitioner submits that under circumstances where there is a disparate quantum of evidence against various co-defendants which would involve a great likelihood of confusion as to the respective proofs that apply to each defendant, together with multiple conspiracies, the court is required to grant a severance.

United States v. Dunnaway, 447, F.2d 940 (9th Cir. 1971)

Barnard v. United States, 342 F.2d 309 (9th Cir. 1965)

B. As the Proof Showed That Petitioner Was Involved In a Conspiracy Less Than That Alleged in the Indictment, Petitioner Was Denied Due Process By Having the Issue of His Guilt Tried in the Contest of an Over-all Conspiracy

Proof of several separate conspiracies, when only one has been charged, is prejudicial to a defendant not involved in the over-all conspiracy.

Rocha v. United States, 288 F.2d 545 (9th Cir. 1961)

Daily v. United States, supra, 282 F.2d 819

Under the guise of a theory of a single conspiracy, the Government has subjected Petitioner to testimony and physical evidence relating to crimes of which there was no evidence of his participation. These being the importation of narcotics through Idelia Castello; the sales of narcotics by George McGee; and the importation by Barbara Gaston and Charles Gray of twelve (12) pounds of heroin from Thailand in August, 1975. These facts show the importance of drawing a dis-

stinction between one over-all conspiracy and multiple conspiracies because of the possible transference of guilt of other defendants, at least in the eyes and minds of a jury.

Kotteakos, supra, 328 U.S. 750

United States v. Perez, 49 F.2d 51 (5th Cir. 1973)

In Kotteakos, the court recognized the problem facing the defendant such as Petitioner when the evidence at trial implicates him only in a limited conspiracy. In that regard, the court stated (Page 767):

> "Obviously the burden of defense to a defendant connected with one or a few of so many distinct transactions is vastly different, not only in preparation for trial, but also in looking out for and securing safeguards against evidence affecting other defendants to prevent its transfer as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate."

Page 774:

> "The dangers of transference of guilt from one to another

> across the lines separating conspiracies, subconsciously or otherwise, are so great that no one can say prejudice to substantial rights has not taken place."

The only testimony linking WILKINS with a conspiracy, was the testimony of Deborah Taylor, which, in and of itself was not overwhelming, and possibly subject to disbelief because of her interest in testifying and thereby obtaining immunity from prosecution for her illegal activities.

The testimony against the other defendants was overwhelming. Not only was there testimony from Deborah Taylor, there was also corroborating testimony from other witnesses and the evidence introduced by way of twelve (12) pounds of heroin, all of which had nothing to do with Petitioner.

Petitioner submits that the jury's finding of his guilty could only be based on the transference of the overwhelming evidence of guilt of the other defendants to Petitioner.

CONCLUSION

A sense of justice and concern for due process compels this Honorable Court to grant certiorari in this cause.

Respectfully submitted,

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MORTON H. BOREN
Attorneys for Petitioner

APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JAMES WILKINS, *Defendant-Appellant.*	No. 76-3740
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. DEREK ESTIS, *Defendant-Appellant.*	No. 76-3726
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. CLARENCE J. LARKINS, *Defendant-Appellant.*	No. 76-2302 MEMORANDUM

[May 22, 1978]

Appeal from the United States District Court
for the Central District of California

Before: KOELSCH and HUFSTEDLER, Circuit Judges, and EAST,* District Judge.

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

THE APPEAL:

The defendants Clarence Larkins (Larkins), James Harvey Wilkins (Wilkins), and Derek Estis (Estis) separately appeal from their respective judgments of conviction and sentence to custody entered on May 28, 1976 by the District Court for violation of 21 U.S.C. §§ 963, 960, 952, 864 and 841(a)(1) (conspiracy to knowingly and intentionally import, possess with intent to distribute, and to distribute controlled substances). On the Government's motion, the separate appeals of Larkins and Wilkins were consolidated. We note jurisdiction and affirm each of the appeals.

DISTRICT COURT PROCEEDINGS:

On February 27, 1976, the three named defendants, along with Charles Gray and Barbara Gaston, were indicted under one count charging the above violation. The alleged objects of the conspiracy were to be accomplished as follows:

Gray, Estis and Larkins organized and put into operation an illegal scheme to import heroin and cocaine from Mexico. Those controlled substances were to be distributed from the Los Angeles area to narcotic distributors in Detroit, Michigan; Miami, Florida, and other cities. Wilkins, also known as "Memphis Slim," was in charge of distributing the narcotics in the Detroit, Michigan area. Later Gray, Estis and Larkins enlarged the enterprise to include the importation of heroin from Thailand.

Unindicted co-conspirator George McGee and others were distributors in the Los Angeles area. The defendant Gaston and unindicted co-conspirators Cheryl Debise and Deborah Taylor aided as couriers of the imported heroin and cocaine to the distributors in the other named cities.

A jury trial on the charges against Larkins, Wilkins, and Estis commenced on May 4, 1976 without defendants Gray and Gaston who were fugitives. The jury returned guilty verdicts, and judgments of conviction and sentence to custody followed. Larkins and Estis are in custody and Wilkins is at liberty on bail.

FACTS:

George McGee, the Government's first principal witness, testified under a promise of immunity. He testified that he first met with Gray to discuss obtaining some narcotics. Gray told McGee of a possible connection in Mexico and asked whether he would be interested in doing some business. McGee later met Estis at Gray's house while Estis and Gray were discussing drugs for someone in Detroit. Evidence introduced later showed that Wilkins was the Detroit buyer. Over the course of several months, McGee observed both Estis and Gray handling and arranging numerous narcotics transactions. McGee arranged several sales for Gray. McGee also observed Larkins, referred to by Gray as his "financial business partner," obtain drugs from Gray.

The second principal witness, Deborah Taylor, a former girl friend of Gray, testified under immunity that she had made several trips within the United States delivering drugs for Gray. Included among her destinations was Detroit and she identified Wilkins as the person to whom she delivered narcotics, having previously met him in Estis' Los Angeles apartment. She testified that Estis made a trip to Detroit in late 1973 to deliver cocaine to Wilkins. Documentary evidence in the form of car rental receipts corroborated this testimony and also showed that Wilkins paid $100 toward Estis' rental bill. In February, 1974, she accompanied Gray to Detroit. Gray had stated that the purpose of his trip was to discuss a debt owed by Wilkins for narcotics. She further testified that on many occasions, she observed drugs in the apartment she shared with Gray and that drugs were often brought there by Estis. She and Gray moved to San Diego for several months, as did Estis, and upon returning to Los Angeles, Gray moved into the same apartment complex occupied by Estis and his wife. Further testimony established that Larkins had arranged the apartments in San Diego.

The Government's third principal witness was Idalia Castello, a resident of Mexico. She explained that Larkins set up a corporation for her as he had done for Estis and Gray in which they kept the proceeds from their drug sales. She later traveled to the United States with Larkins to discuss and eventually

deliver drugs to Gray and Estis. She subsequently accompanied Estis to Mexico, meeting Gray, Larkins and others there, in an abortive attempt to obtain drug samples.

Additional evidence was introduced showing that Gray and Barbara Gaston were arrested at the Miami airport on August 25, 1975, while attempting to smuggle 12 pounds of heroin into the country. After giving Gray his constitutional rights, he led the customs agents to a locker which contained his and Gaston's passports, approximately $10,000 in cash, and an address book containing, among others, Wilkins' telephone number. Gray's passports showed that he had recently visited Thailand. The drugs were wrapped in Thai newspaper. Later in the afternoon Larkins arrived in Miami with approximately $9,000 in cash. He, too, had been in Thailand recently. Further evidence showed that Estis had also been in Thailand during the same period.

Lastly, the Government introduced evidence of telephone records showing continuing telephone contact between the various co-conspirators during the course of the conspiracy. Additional documentary and physical evidence was introduced to corroborate much of the above testimony.

CONSOLIDATED APPEALS OF LARKINS AND WILKINS:

Issues on Review:

1. Was there a prejudicial variance between the indictment and the proof with respect to the scope of the alleged conspiracy and Wilkins' participation therein?

2. Did the District Court err in refusing to strike the testimony of Idalia Castello because the Government did not inform Larkins of the substance of the testimony until the day before she testified?

3. Did the District Court properly instruct the jury with respect to the issue of evidence of "mere association" as proof of membership in a conspiracy?

DISCUSSION:

Issue 1:

Wilkins contends that although only a single conspiracy was alleged in the indictment, the evidence proved separate conspiracies. He urges that prejudice from the resulting variance follows from the Government's failure to connect him to what is characterized as a second conspiracy. We agree that it is "important to avoid confusing the similar purposes of numerous separate adventures of like character, with the single purpose of one over-all scheme. . . . [T]he Government had the burden of connecting each defendant directly or circumstantially with the larger over-all scheme." *United States v. Baxter*, 492 F.2d 150, 158-59 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974).

In order to bear its burden, the Government must show that Wilkins knew or had reason to know that his "own benefits derived from the operation were probably dependent upon the success of the entire venture . . . ." *Id.* at 158. Wilkins relies, *inter alia*, on *Kotteakos v. United States*, 328 U.S. 750 (1946), and *Baxter* to support his argument that evidence was not introduced to link him to the overall conspiracy. This reliance is misplaced as we are not here presented with a "wheel" type conspiracy as discussed in *Kotteakos* and *Baxter*. The importation, which Wilkins contends he was not a participant in, was well within the overall conspiratorial plan. Such acts, even if unknown to Wilkins, are properly admissible against him to prove the existence of the conspiracy. Recognizing that once a conspiracy is established, it is presumed to continue [*United States v. Roselli*, 432 F.2d 879, 898 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971)] and that sufficient evidence was presented to indicate that Wilkins was a participant in the conspiracy and knew of its actions through August, 1975, we find no variance between the proof and the indictment. (*See United States v. Cirillo*, 468 F.2d 1233, 1238-39 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973).)

Wilkins' remaining arguments are: (a) The evidence was insufficient to tie Wilkins to the conspiracy; and (b) His motion for severance should have been granted due to a "possible transference of the guilt" of the other defendants.

We conclude that the evidence before the jury satisfies the recently clarified slight evidence rule enunciated in *United States v. Dunn*, 564 F.2d 348, 356-57 (9th Cir. 1977). We stated there:

> "Conspiracy in the criminal law, as defined by the relevant statutes, is a crime. Those *knowingly* participating in the

conspiracy in any respect or to any degree are guilty of that crime, but their guilt must be established under the same standards applicable to those charged with any other crime—neither more nor less—and the sufficiency of the evidence is subject to the same standards of review.

". . . . Once the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the *connection is slight,* is sufficient to convict him with knowing participation in the conspiracy. Thus the word 'slight' properly modifies 'connection' and not 'evidence.' It is tied to that which is proved, not to the type of evidence or the burden of proof." (Emphasis in original).

We find no abuse of discretion on the part of the District Court in denying Wilkins' motion for severance of trial. *United States v. Smith,* 563 F.2d 1361, 1363 (9th Cir. 1977); *United States v. Kaplan,* 554 F.2d 958, 965-66 (9th Cir.), *cert. denied,* 46 U.S.L.W. 3322 (U.S. Nov. 15, 1977) (Nos. 77-518 and 77-541); and Fed. R. Crim. P. 14.

Issue 2:

We conclude that the District Court did not err in refusing to strike the testimony of Castello. Larkins contends that it should have been stricken since the Government failed to notify him of Castello's status as a Government witness until the day before she testified. Larkins concedes there was no discovery order and that Fed. R. Crim. P. 16 does not require disclosure, but nevertheless maintains that the Government was bound to notify him because of earlier representations concerning discovery and assertions in the trial memorandum that the proof would follow the allegation of overt acts in the indictment.

The Government supplied Larkins with witness statements and summaries concerning McGee and Taylor on April 23, 1976 and agreed to make Jencks Act material available on the Friday before trial[1] as to all witnesses except those who were not available to the Government until shortly before trial. Castello, due

[1]Under the Jencks Act, such material need not be disclosed until after direct examination. 18 U.S.C. § 3500.

to a variety of factors, was first secured as a witness very shortly before trial. She was interviewed on May 4 and a summary was given to Larkins' counsel on May 6 after Government witnesses McGee and Taylor had testified. Prior to Castello's testifying, Larkins' counsel had an opportunity to interview her, but she independently refused to be interviewed.

Larkins does not dispute that the Government acted in good faith in delaying its decision to interview Castello until May 4. Larkins' counsel had full opportunity to cross-examine her and no specific prejudice has been claimed, let alone shown, other than the fact that counsel might well have cross-examined McGee and Taylor differently. The supposition is hollow because the direct testimony of Government witnesses McGee and Taylor did not substantially implicate Larkins in the context of the Castello direct testimony.

Issue 3:

This assignment of error is meritless. We have perused the District Court's instructions and find the substance and meaning of Larkins' requested "mere association" instruction to have been fully and fairly covered in the District Court's instruction, *viz.:*

"[M]ere similarity of conduct among various persons, and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy."

That instruction is an adequate statement of the law. *Nipp v. United States,* 422 F.2d 509, 514 (10th Cir. 1969), *cert. denied,* 397 U.S. 1008 (1970).

APPEAL OF ESTIS:

We deem the decisive issues to be:

1. Was Estis denied either the right of counsel of his choice or the effective assistance of counsel?

2. Was the indictment duplicitous by charging more than one offense?

3. Was there a fatal variance between the indictment and the proof?

4. Did the District Court err in admitting Estis' passport which had been surrendered as a condition of bail?

5. Did the District Court err in refusing to suppress the suitcase containing heroin?

6. Did the District Court err in refusing to suppress the police search of the premises at 637 N. Doheny, Beverly Hills, California?

DISCUSSION:

Issue 1:

In a two prong attack upon his counsel's representation at trial, Estis contends that he was not allowed to have counsel of his choosing and that the counsel who did defend him was inadequate. The attack is meritless.

Estis initially wanted to substitute retained counsel, who was representing him in an unrelated state case, for his appointed counsel. Apparently the primary motivation behind the request was to delay this case until the other trial could be completed. The request for substitution, however, was withdrawn when the Court refused to grant a four to six week continuance, which, counsel contended, was needed for adequate preparation. The trial judge, after weighing the various factors to be considered, felt that a two week continuance was sufficient. "It is axiomatic that the granting of a continuance lies within the sound discretion of the trial judge and will be reversed only upon a showing of a clear abuse of discretion." *United States v. Michelson,* 559 F.2d 567, 572 (9th Cir. 1977) (Citations omitted). We find no abuse of discretion. At no point during the hearing was appointed counsel's competency attacked. However, after the jury began deliberating, Estis filed a handwritten motion for a mistrial based upon what he characterized as an "inappropriate defense." There was a conflict in the statements given by Estis and his counsel concerning the primary issue of whether Estis had requested counsel to call specified witnesses. As to other witnesses which Estes wanted to cross-examine further, the District Court offered to allow such a procedure, but Estis withdrew his request. Further complaints against counsel dealt with his choice of tactics. The District Court specifically found, after observing the progress of the case and examining the *in camera* filings, that Estis was effectively represented. We agree.

Issue 2:

Estis contends that the Government's evidence supported two separate conspiracy counts which were "duplicitously amassed" into one count. We reject this contention because it was not raised before the District Court. "It is the rule in this Circuit that failure to object to duplicity either prior to or during trial, constitutes a waiver of that objection." *Mitchell v. United States,* 434 F.2d 230, 231 (9th Cir. 1970), *cert. denied,* 402 U.S. 946 (1971). See Fed. R. Crim. P. 12(b).

Issue 3:

For the reasons stated in the discussion above relating to Wilkins' first contention, we conclude that this issue is rightfully answered "No."

Issue 4:

Estis argues that admission of his passport into evidence after its submission as a condition of bail resulted in compelling him to waive his Fifth Amendment privilege against self-incrimination in order to effectuate his Eighth Amendment right to reasonable bail.

> "[Estis'] claim fails because the element of ownership is not present. Under the applicable federal regulations passports are declared to be the property of the government.[4] Just as in *Davis v. United States,* 328 U.S. 582 . . . (1946), where the Supreme Court held that no Fifth Amendment guarantees interfered with the government's seizure of gasoline ration tickets because as a matter of statutory declaration they were publicly owned, Fifth Amendment guarantees are not relevant to this case."

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[4] "22 C.F.R. § 51.9 reads as follows:

"A passport shall at all times remain the property of the United States and shall be returned to the Government upon demand."

United States v. Falley, 489 F.2d 33, 41 (2d Cir. 1973).

The evidentiary use of the passport was not error.

Issue 5:

Estis contends that since he surrendered prior to the arrest of Gray and Gaston and the seizure of their suitcase, he had effectively withdrawn from the conspiracy and should not, therefore, be held responsible for the acts of Gray and Gaston or for

tratiive and financial resources to litigate anywhere.

the seizure of the suitcase. He claims that the evidence is irrelevant since the conspiracy had ended as to him. The Government contends that Estis' act of surrender did not act as a withdrawal from the conspiracy.

Established conspiracy principles teach:

> "[T]he requirement that out-of-court declarations by a conspirator be shown to have been made while the conspiracy charged was still in progress and in furtherance thereof arises only because the declaration would otherwise be hearsay. The ongoing conspiracy requirement is therefore inapplicable to evidence, such as that of *acts* of alleged conspirators, which would not otherwise be hearsay. Thus . . . acts of one alleged conspirator could be admitted into evidence against the other conspirators, if relevant to prove the existence of the conspiracy, 'even though they might have occurred after the conspiracy ended.' [Citations omitted]." *Anderson v. United States,* 417 U.S. 211, 219 (1974). (Emphasis in original).

Whether Estis withdrew from the conspiracy is not determinative; the question of relevancy does not hinge on whether or not the conspiracy had ended. Gray and Gaston's act of importing heroin in such a large quantity was obviously relevant to prove the prior agreement which formed the basis of the offense charged.

The District Court's refusal to suppress the seizure of the suitcase was not error.

Issue 6:

Estis argues that the warrantless search of the N. Doheny premises was invalid because he had not relinquished control over the house and no one in a position to consent had given permission for the search. By February 10, 1975, the day before the search, the owner of the house had not received the monthly rental payment and he had been unable to reach anyone at the house. A realtor told the owner that the occupants had moved out and produced a letter from Larkins authorizing a sublease. This information was relayed to the Sheriff's Department and the house, with the consent of the owner, was searched the next day. The police found the house in a state of disarray, and

there were items of personal property left behind. At trial, Estis testified that he had authorized the realtor to sublease the property, had started moving out before the search, and that his brothers were planning to return and did in fact return after the search to move the remainder of the property. He further stated that he realized the house would have to be cleaned but he had left Los Angeles for Vancouver, Canada prior to the search, never returning to the house.

The District Court found that the house was abandoned by Estis. "If a person has voluntarily abandoned property, he has no standing to complain of its search or seizure. *Abel v. United States,* 362 U.S. 217, 240-41 . . . (1960)." *United States v. Jackson,* 544 F.2d 407, 409 (9th Cir. 1976). "Abandonment is primarily a question of intent, and intent may be inferred from words, acts and other objective facts. . . . Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search." *Id.* at 409. (Citations omitted). We conclude that the District Court's finding as to abandonment by Estis was not clearly erroneous. *United States v. Hart,* 546 F.2d 798, 801-02 (9th Cir. 1976) (en banc), *cert. denied,* 429 U.S. 1120 (1977).

Lastly we conclude that the evidence as viewed in the light most favorable to the Government was more than ample to support the jury's verdicts as to Larkins, Wilkins, and Estis. *Glasser v. United States,* 315 U.S. 60, 80 (1942), and *United States v. Jones,* 518 F.2d 64, 65 (9th Cir. 1975).

The judgment of conviction and sentence to custody entered by the District Court in Larkins, No. 76-2302, Estis, No. 76-3726, and Wilkins, No. 76-3740, are affirmed.

The enlargement on bail as to Wilkins, No. 76-3740, is revoked now. The Clerk shall file a counterpart of this opinion in the consolidated appeals in Nos. 76-2302 and 76-3740, and a second counterpart in No. 76-3726 and forthwith issue the respective mandate hereon.

AFFIRMED.

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